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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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In the Matter of:	)	*MM Docket No. 98-35*
	)	
1998 Biennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

COMMENTS OF FREEDOM OF EXPRESSION FOUNDATION, INC.

Respectfully submitted,

FREEDOM OF EXPRESSION FOUNDATION, INC.

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SUMMARY

The Freedom of Expression Foundation, Inc. ("FOE"), a private membership corporation which seeks, through research and educational programs, to preserve and advance the First Amendment rights of the mass media, submits these comments in response to the Commission's *Notice of Inquiry* concerning its Biennial Review of Broadcast Ownership Rules. FOE strongly urges the reexamination and elimination of unnecessary rules and policies governing ownership of broadcast stations, including, *inter alia*, the One-to-a-Market Rule, the Television Duopoly Rule, and the 20-year old rule prohibiting newspaper-broadcast common ownership in the same market.

FOE supports a complete repeal of the One-to-a-Market Rule and the newspaper-broadcast crossownership ("NBCO") rule, rather than just a mere relaxation of present waiver policies. While waivers of the One-to-a-Market Rule have been routinely granted in the top 25 markets, which may be expanded to the top 50 markets as directed by the Congress, waivers are precluded in smaller markets unless there is a "failed station" and unless some additional public interest benefit can be shown. The deployment of scarce agency resources to processing such waiver requests can be better put to use elsewhere. At a time when mega-mergers between dominant long distance carriers and cable MSO's are taking place, it is ludicrous for the Commission to be in the business of micromanaging the local media markets by such severe restrictions. Such restrictions which are clearly content based restrictions on freedom of expression can no longer pass Constitutional scrutiny.

With respect to the newspaper-broadcast Crossownership Policy, it should be noted that the Commission has granted only three permanent waivers of the NBCO

rule, and only one involving radio. The waivers have been based on unique factual patterns that are unlikely to be repeated. Granting a few more waivers will not level the playing field for the radio broadcaster–*or* the local daily newspaper–when faced with increased competition from the cable companies, the telephone companies, new exotic electronic media, and the Internet. The Commission itself has expressed concern about the continuing decline in the number of daily newspapers in this country, and that radio can no longer be considered a significant source of news. Yet for more than twenty years it has adhered to a policy that prohibits newspaper-broadcast ownership in the same market.

With respect to questions concerning whether the Commission should *expand* its definition of media markets and media "competition" to take into account such factors as profitability and percentage of advertiser revenues, FOE respectfully submits that this mode of examination is neither authorized nor permitted by the Telecommunications Act of 1996.[1] Adequate machinery and expertise for such inquiry already exists in two other federal agencies. Nor should the local radio ownership rules be used by the Commission to engage in unauthorized, unnecessary and unconstitutional social engineering. To the extent that increasing the percentage of ownership of radio stations by minorities or women is a permitted field of regulation and a legitimate public interest objective, other means exist that can be far more effective than artificially depressing the market value of an entire industry.

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[1]PUB. L. No. 104-104, 110 Stat. 56 (1996). Section 202(b) of the Act directs the Commission to amend its rules to provide for the local ownership of more than one radio station depending upon the size of the market. There is nothing set forth in that section or anywhere else that authorizes the Commission to promulgate anti-trust policies that would have the effect of undermining that very specific directive.

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To: The Commission

COMMENTS OF FREEDOM OF EXPRESSION FOUNDATION, INC.

Comes now FREEDOM OF EXPRESSION FOUNDATION, INC. ("FOE"), by Counsel and pursuant to Section 1.415(a) of the Rules (47 CFR §1.415(a)), hereby respectfully submits these Comments in response to the Commission's *Notice of Inquiry*[2] in the above-captioned proceeding. In support whereof, the following is shown.

I. STATEMENT OF INTEREST

1. FOE is a private membership corporation which seeks, through research and educational programs, to preserve and advance the First Amendment rights of the mass media, particularly the electronic mass media, and the freedom of the press, both print and electronic, from governmental intrusion in the editorial process and the dissemination of information by the press to the public. FOE's members and contributors include private foundations, publishers of daily newspapers, broadcast licensees, cable MSO's and program suppliers, trade associations for broadcasters and newspapers, regional telephone companies, and other corporate entities which generally support the research and educational objectives of FOE. FOE has participated in numerous Commission proceedings in the past, with a view toward assisting the

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[2]FCC 98-37, released March 13, 1998; 63 F.R. (3/31/98). (hereafter, "*NOI*")

Commission to develop a full and complete record concerning the First Amendment implications of public policy alternatives. Given the vast changes in the Communications industry during the past two decades, which have resulted in a substantial increase in the diversity of information and outlets of communication, First Amendment considerations require the FCC to revise and "modernize" its structural and ownership regulations, including cross-ownership regulations, for broadcast licensees.

2. FOE has a direct interest in the development and maintenance of competition in the mass media market and supports the adoption of policies by the Commission that would promote diversity through the lifting of artificial barriers on the ownership and control of electronic Communications entities, which inhibit the full and robust exercise of freedom of expression by these entities.

3. More specifically, in response to the Commission's *NOI*, FOE believes the Commission's One-to-a-Market, and Newspaper-Broadcast Cross-Ownership Rules should be eliminated in their entirety or *substantially* relaxed to permit joint ownership, joint operating agreements, or other joint ventures of commercial radio stations and television stations and/or publishers of daily newspaper in all but the smallest markets in order to take advantage of economies of scale in the marketplace.

4. We are entering a time when the traditional distinctions between forms of communication media are blurring and no longer make sense. Traditional print media are now publishing electronically over the Internet, as are radio stations. Telephone companies are providing Internet as well as cable television services to the public. The continuation of cross-ownership restrictions such as the One-to-a-Market Rule, in the face of such multimedia operations is anachronistic, unnecessary, and places an undue burden on a speaker's First Amendment right to reach an audience through a variety of media, and the concurrent right of the public to gain access to

information in a variety of formats. Moreover, the complex "presumptive" waiver policy of the One-to-a-Market Rule discriminates in favor of the larger, and more endowed media companies, who can afford to occupy the major markets; it also demands the expenditure of significant agency resources to administer that is better spent elsewhere. Finally, and most important, such a rule, which admittedly restricts freedom of speech simply can no longer be justified.

5. FOE also respectfully submits that continued enforcement of the NBCO rule no longer serves the stated public interest goals of promoting competition and diversity, is counterproductive to effective competition among media, and places significant and unjustified barriers to the exercise of First Amendment rights.

II. THE ONE-TO-A-MARKET RULE SHOULD BE ELIMINATED

6. FOE supports the elimination of the One-to-a-Market Rule. It is outmoded and inconsistent with the present realities of the media marketplace, and raises serious questions concerning its consistency with the First Amendment.

7. At present, the rule prohibits the common ownership of a television and radio station in the same market. Waiver of the rules is routinely granted by the Commission if the affected stations are in the top 25 television markets and where, after the merger, there would remain at least 30 independently-owned broadcast voices.[3] Section 202(d) of the Telecommunications Act of 1996 directed the Commission to extend its presumptive waiver policy to the top 50 television markets if it finds that doing so would be in the public interest.[4]

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[3] *See NOI, supra.*, ¶9. The Commission noted that the One-to-a-Market Rule is the subject of other pending proceedings, in MM Docket Nos. 91-221 and 87-8. *Id.* ¶9, at n. 13.

[4] *Id.*

8. Because the Commission has indicated that it is not seeking additional comments on the One-to-a-Market Rule because it is already the subject of on-going rule-making proceedings, FOE will not address this issue at length. However, the point should be made that modification of the waiver policy from the top 25 to the top 50 television markets is an inadequate response to §202(h) of the Telecom Act. The realities of the media marketplace today make such restrictions unnecessary[5] and artificial restraints on the ability of certain entities to compete while other entities have no such restrictions is unsound and contrary to public policy. If the Commission is truly interested in promoting *competition*, it must eliminate outdated cross-ownership restrictions and level the playing field.[6] Accordingly, the One-to-a-Market Rule should be eliminated,[7]

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[5]As the Commission is well aware, grandfathered radio-TV combinations seldom have integrated operations except for general and administrative. Ironically, in Rockford, Illinois, the Commission staff exacted from ABRY and Connoisseur a promise of joint cooperation between the Connoisseur-held radio stations in that market and the television station proposed to be acquired by a separate ABRY-controlled entity.

[6]The proposed merger of the dominant long distance carrier and a large MSO is only the most recent example of how, at one end of the spectrum, the Commission can look favorably upon cross-media ownership, yet continues to restrict and micromanage the rules pertaining to ownership of one radio station and one television station. What's wrong with this picture?

[7]If the Commission is concerned about those few "egregious cases," provision can be made in a completely revised §73.3555(b) to permit Radio-Television combinations except in those cases where the subsequent combination would result in the ownership or control of greater than fifty percent (50%) of the *broadcast (i.e., Radio and Television)* media voices in the market.

III. THE LOCAL RADIO OWNERSHIP RULES SHOULD BE MAINTAINED IN THEIR PRESENT FORM

9. As part of the present inquiry, the Commission has asked whether there should be any modification of its rules governing local radio ownership[8] in light of, *e.g.*, the consolidations that have taken place over the last two years and the relative decline in the number of minority-owned radio facilities.[9] It is FOE's position that modification of the local radio ownership rule is neither authorized nor warranted.

A. THE COMMISSION IS WITHOUT AUTHORITY TO MODIFY THE LOCAL RADIO OWNERSHIP RULE.

10. The Commission lacks authority to modify the local radio ownership rules by adding further restrictions or processing criteria. The same act of Congress that authorized the instant biennial review also directed the Commission to revise its local radio ownership rules in a very precise way. Those revisions were the result of numerous considerations and compromises among the Conference Committee members of the House and Senate that worked out the final language to the Telecommunications Act of 1996. It is unlikely that it was Congress's intent that the Commission adopt more, rather than less restrictive measures only two short years later.

11. Moreover, the authorization and directive to the Commission under Section 202(h) of the Telecommunications Act of 1996 to conduct biennial reviews of its broadcast ownership rules clearly contemplates that *unnecessary* ownership regulations be *eliminated* –not that new and more restrictive and complex regulations be adopted. It is for this reason that FOE respectfully submits that the Commission

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[8] 47 CFR §73.3555(a).

[9] *NOI, supra*, ¶¶17-23.

is without authority to develop a new scheme of local ownership regulation that includes additional factors such as listening audience percentages, or shares of local radio advertising revenues.[10] It is also clear that Congress intended that the Commission to use its current definition of a radio "market," and not adopt a different method dependent, in whole or in part, upon the availability of proprietary audience research data or share of national and local advertising revenues.

B. MODIFICATION OF THE LOCAL RADIO OWNERSHIP RULE AT THIS TIME IS BOTH UNWARRANTED AND UNWISE.

12. Even if it has the authority from Congress to make substantial modifications to §73.3555(a), a matter clearly under dispute,[11] attempts to reintroduce consideration of audience ratings or shares of advertiser revenues is unwise and unwarranted. The Commission lacks expertise in the area of economic analysis of market power, and other agencies of the federal government can and do engage in such activity.[12] Moreover, the Commission's recent experience with administering the "duopoly" rule adopted for radio in 1992, suggests that use of audience research data is both complex and confusing, depriving licensees of the certainty necessary to plan and engage in broadcast transactions,[13] with the resulting waste of time and energy by all concerned in the submitting and processing of ungrantable applications. We should not be doomed to repeat the regulatory mistakes of the past.

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[10] *Cf.*, *NOI*, ¶21 at n. 23.

[11] *See, e.g.*, "Billy Tauzin Takes on the FCC," RADIO BUSINESS REPORT, June 28, 1998, pp. 6-10.

[12] The adoption by the Commission of separate rules and guidelines which differ from those in use by, *e.g.*, the Department of Justice, would lead to confusion, contradiction and delay. And if the same criteria are adopted, there is needless duplication of scarce agency resources.

[13] *see, e.g.*, Hunsaker, *Duopoly Wars: Analysis and Case Studies of the FCC's Radio Contour Overlap Rules*, 2 COMMLAW CONSPECTUS pp 21-41 (1994).

13. But more important, no factual basis exists that would warrant a more restrictive limit on local radio ownership. The fact that there has been significant consolidation in the radio industry is hardly a reason for added restrictions. Consolidation is a result that was specifically contemplated by both Congress and the Commission.[14] The resulting small decline in the overall number of independently owned stations is thus no cause for concern. It was both expected and desired as a way to improve the economic health of the radio industry. It has done so. And, while the economic health of the radio industry has improved, that is no reason to go back to a more restrictive rule on local ownership. The four-tiered market approach adopted by Congress in §202(f) of the Telecommunications Act, provides adequate safeguards against "overconsolidation,"[15] while at the same time assuring that local diversity will continue.

14. A second point of inquiry raised by the Commission is whether or not the current local radio ownership rule has thwarted other Commission public interest goals such as increasing the percentage of ownership of broadcast media held by minorities and females.[16] There would appear to be no causal connection between the two. While it may be true that the number of radio stations owned by minorities declined between 1995 and 1997, there is nothing to suggest that opportunities for

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[14]Indeed, the benefits of such consolidation, including economies of scale afforded by joint operation of two or more stations in a market, was the primary reason cited by the Commission in adopting the 1992 Radio Contour Overlap Rules. *Report and Order*, In re Revision of Radio Rules and Policies, 7 FCC Rcd 2755, ¶2, 70 RR 2d 903 (1992), *recon. granted in part*, 7 FCC Rcd. 6387, 71 RR 2d 227 (1992).

[15]In fact, the pace of radio consolidation has now slowed significantly, clearly demonstrating that there is no need to adopt regulatory countermeasures. *See, e.g.*, "Consolidation Slows Down...," RADIO BUSINESS REPORT, July 13, 1998, p. 6.

[16]*NOI, supra.*, ¶22.

minorities to acquire stations that might otherwise have existed were eliminated as a result of consolidation acquisitions.[17]

15. In any event, other means exist that can more directly influence the number of minority-owned stations. It is no coincidence that the period of decline also matches the period of time that the Commission's former tax certificate policy has been repealed by Congressional action. The Commission's own records reveal that this policy when it was in effect, accounted for more broadcast acquisitions by minorities than any other "affirmative action" policy.[18] And, while the Commission is without authority itself to reinstate the tax certificate policy, it can certainly recommend to Congress that it be reinstituted, this time with additional safeguards. Other policies designed to induce sellers to sell to minority buyers and for lenders to provide financial assistance to such groups are possible and more likely to achieve the Commission's stated objective of increasing the percentage of minority ownership in the radio industry.[19]

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[17]The only possible basis for drawing such a conclusion is that the lifting of local ownership restrictions has, by itself, caused such an increase in the valuation of radio stations so as to price them out of reach of undercapitalized minority groups. Such an argument has, in fact been made, despite the fact that station values rose significantly in the 1980's without the benefit of any relaxed local ownership rule. In any case, it would be a monstrous perversion of public policy and a total breach of the Commission's obligation to act in public interest for it to attempt to artificially lower the market value of radio stations nation wide so as to make them more affordable to a particular group.

[18]Unlike the Commission's former comparative hearing policy that permitted a split as between voting control and equitable ownership, the more restrictive requirement of 51% equitable ownership by minorities of the tax certificate policy provided much greater assurance that the entity acquiring the station was not a sham.

[19]Recent Supreme Court decisions suggest that a number of regulatory schemes designed to increase minority ownership and participation as the expense of nonminority citizens simply will not pass Constitutional muster. Policies which in effect constitute "reverse discrimination" are unsound, harmful to society, and in any event, unlikely to be upheld by the Courts.

16. What of female ownership? As the Commission itself has noted, there is a lack a data on the number of females who own all or part of a radio broadcast facility.[20] The Commission could certainly get a rough idea of the percentage of female ownership by reviewing its own ownership records. But even if it is found that female ownership is significantly less than male ownership, that would not warrant adopting a policy that exceeds the Commission's authority to promulgate and could likely to run afoul of the First, Fifth and Fourteenth amendments to the U.S. Constitution.[21] Such blatant attempts to engage in unauthorized, unwarranted, and potentially dangerous social engineering should be discouraged.[22]

IV. THE NEWSPAPER/BROADCAST CROSSOWNERSHIP RULES SHOULD BE REPEALED

17. FOE respectfully submits that continued enforcement of the NBCO rule no longer serves the stated public interest goals of promoting competition and diversity, is counterproductive to effective competition among media, and places significant and unjustified barriers to the exercise of First Amendment rights. The following analysis is advanced to support this thesis.

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[20] *NOI, supra.*, ¶22, n. 24. FOE would speculate here that a study of the gender of broadcast owners in corporate and related entities would reveal that considerable ownership of the stock is in the name of a husband and wife as joint tenants or owned by females outright.

[21] *Cf., Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985). The Court struck down the Commission's female ownership comparative preference policy without reaching the Constitutional question. Moreover, a policy judgment made by the Commission that certain societal groups, *i.e.*, minorities and women, are more deserving than others of the right to use the public airwaves, is, at bottom, a content-based restriction of the First Amendment right to freedom of speech.

[22] "Billy Tauzin Takes on the FCC," *supra*, note 11

A. BACKGROUND

1. Bases for Adoption of the NBCO Rules

18. A short summary of the historical background surrounding the adoption and enforcement of the NBCO Rules may be helpful: The NBCO Rules were first proposed by the FCC in 1968, as a result of some pressure, on the part of Congress and the Department of Justice, to codify a general proscriptive rule. Up until that time, the Commission had been proceeding on a case-by-case basis in determining whether a proposed newspaper-broadcast combination would constitute an undue concentration of media control in a particular market. The case-by-case method favored the proposed combinations in most instances.

19. While originally proposing the complete breakup of newspaper-broadcast combinations over a five-year period, the FCC, adopted a policy which proscribed future newspaper-broadcast combinations, but "grandfathered" all but a handful of "egregious cases," the owners of such co-located properties being ordered to divest. (*Second Report and Order* Docket 18110, released 1/31/75). Part of the reason for the Commission's altered position had been the statistical evidence, submitted during the proceeding that newspaper-owned stations actually produced a larger percentage of news, public affairs, and other public service programming than did independently owned stations. In addition, the Commission also expressed the fear that a complete breakup would cause such instability in the industry as to *dis*serve the public interest, convenience and necessity.

20. On appeal, however, The D.C. Circuit reversed that portion of the rules which grandfathered existing combinations, and ordered the FCC to adopt a rule

requiring divestiture of *all* such combinations.[23] Given the primary goal of the FCC to promote *diversity of thought and opinion* in its broadcast licensing decisions, the Court said that considerations such as industry stability and a past history of public service, were entitled to little weight, and that the Commission was compelled to announce a *presumption*, as a matter of law, that co-located newspaper-broadcast facilities do not serve the public interest.[24]

21. The U.S. Supreme Court reversed the D.C. Circuit decision. While it upheld the constitutionality of the NBCO Policy, it agreed with the FCC that full-scale divestiture was unnecessary. The Court said that industry stability and public service were legitimate public interest goals which the FCC was entitled to take into account, and that the decision to make the NBCO Rules prospective in application only was permissible as a reasonable agency response to changed circumstances in the Broadcasting industry.[25]

22. Most of the grandfathered combinations, however, continue to operate today. Despite the relative stability of the existing newspaper-broadcast combinations since 1975, the face of the media marketplace today has changed beyond all recognition. The lack of diversity which Congress, the DOJ, and the FCC were lamenting in the 1970's, has turned into an uncontrolled explosion of electronic media choices that brings with it new problems in economic stability and spectrum management. Despite alarmist cries of unfair competition due to recent consolidations in the radio industry, market domination by any one medium, however, is

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[23] *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977).

[24] *Id.*

[25] *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

not one of them. In 1985 the Commission announced that its goal of media diversity had been essentially achieved in all markets, and that heavy-handed government intervention in the form of content, and even arbitrary structural regulations, were no longer necessary, and perhaps, even counterproductive.

2. *Congressional Prohibition on Relaxation of Rule*

23. In the Fall of 1987, the Freedom of Expression Foundation, Inc. submittted a Petition for Rule Making to the Commission, asking for repeal of the NBCO Rules. Several newspaper-broadcast groups filed comments in support of the petition. Before the Commission could act on the matter, however, Congress, at the instigation of Senators Kennedy and Hollings, passed a rider to the 1988 appropriations bill that proscribed the use of public funds by the FCC to conduct *any* rule making proceedings regarding NBCO, and forbade the FCC from entertaining any waivers, or granting any extensions of temporary waivers of the NBCO Rules.

24. It was no secret that the rider was aimed at Rupert Murdoch, who, through his acquisition of Metromedia, had also acquired ownership of television stations in the New York and Boston markets, in which he also owned daily newspapers. The rider to the appropriations bill passed and President Reagan did not veto the measure.

25. NewsAmerica Publishing, Inc., controlled by Mr. Murdoch, then sought an extension of the temporary (18 month) waivers it had received earlier. After being turned down by the FCC which cited the Hollings Amendment, NewsAmerica appealed to the U.S. Court of Appeals for the District of Columbia Circuit, and challenged the constitutionality of the Amendment. The Court, while refusing

to rule on the validity of the more general prohibition of funding for rule making proceedings, did strike down that part of the amendment which forbade the FCC from granting or extending waivers. The Court, after reviewing the legislative history and post-adoption colloquies on the Senate Floor, ruled that the amendment had targeted Murdoch so specifically and exclusively as to be tantamount of a "bill of attainder," and a violation of the First Amendment and denial of Murdoch's rights to equal protection under the Fifth Amendment.[26] The more general question of whether Congress could keep the FCC from reexamining the NBCO Rules was deemed not yet ripe for review. Murdoch later sold the New York newspaper and the Boston TV Station, so the general issue of the whether the NBCO Rules should be repealed was never addressed after the Court's disposition.[27]

3. Subsequent History

26. The Congressional ban on the Commission spending appropriated funds "to repeal, retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies established to administer..." the NBCO rules continued to be included in federal appropriations bills between 1988 and 1993.[28] In the FCC's 1994 appropriation, however, Congress provided that the Commission

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[26] *NewsAmerica Publishing, Inc. v. FCC*, 844 F.2d 800 (1988).

[27] While the controversy involving the Hollings Amendment took place in December, 1987 and early 1988, the FCC did not get around to ruling officially on the Foundation's petition until April of 1991. A letter from the Chief of the Mass Media Bureau of the FCC addressed to Counsel for the Foundation stated that the petition was being dismissed as a result of the Congressional proscription, which had been added to the language of subsequent appropriations authorizations for fiscal years 1989-90, 1990-91 and 1991-91. FOE at that time did not seek Court review of the Commission's ruling.

[28] *NOI*, ¶6.

could amend its NBCO policies with respect to the grounds for granting permanent waivers thereof.[29]

27. However, it was clear from the House Report that the legislative intent was to limit permanent waivers only to newspaper-radio combinations in the top 25 markets where a minimum of 30 independently owned broadcast "voices" would remain following the acquisition or merger. In addition, the House Report indicated that it expected the Commission to make "a separate affirmative determination that [the proposed combination] is otherwise in the public interest, based upon the applicants' showing that there are specified benefits to the service provided to the public sufficient to offset the reduction in diversity which would result from the waiver."[30] This language was not repeated in the 1995 or 1996 appropriations laws or the accompanying conference reports, and the Commission regards itself as no longer prevented from spending Congressionally authorized funds to reexamine its NBCO rules and policies.[31]

28. On February 8, 1996 President Clinton signed into law the Telecommunications Act of 1996, which contained numerous provisions that will have the effect of completely restructuring the Communications industry. While national and local broadcast ownership rules were modified as a result of the Act, there was no provision for modification of the NBCO policies.[32]

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[29]*Id. See* 107 Stat. 1167 (1993).

[30]*NOI*, ¶6, citing to H. Rept. 103-293, 103rd Cong., 1st Sess (1993), pp 2-3.

[31]*See, Notice of Inquiry, "Newspaper/Radio Cross-ownership Waiver Policy,"* FCC 96-381, released October 1, 1996, ¶7.

[32]An amendment to the House version of the bill that would modify the NBCO rules was voted down by the House. *NOI*, ¶7. 141 Cong. Rec. E-1571 (August 1, 1995).

29. The Act *did* authorize, and, in fact *require*, the Commission to review *all* of its ownership rules biennially as part of its regulatory reform review under the newly-amended Section 11 of the Communications Act of 1934. More specifically, the Commission was directed to:

> [D]etermine any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[33]

The present *NOI* is an attempt by the Commission to meet that obligation.

B. REPEAL OF THE NBCO RULE IS WARRANTED

30. FOE respectfully submits that an examination of the Commission's present rules and policies with respect to newspaper-broadcast crossownership cannot be undertaken without first examining the purposes of the NBCO rules, whether they are necessary to protect the public interest, and, indeed, whether they are, in fact, *counterproductive* to the public interest as well as violative of the First Amendment to the Constitution of the United States. FOE submits that an analysis of the present Communications environment will demonstrate that the NBCO rules are no longer necessary, and indeed, counterproductive to the Commission's twin goals of diversity and competition.

31. FOE also submits that, whatever constitutional basis existed for such rules twenty years ago, such basis has long since evaporated. That being the case, these rules can no longer withstand constitutional scrutiny, and must be repealed as contrary to the First Amendment. Alternatively, they must be completely

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[33]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, §202(h) (1996).

revamped to be as narrowly tailored as possible to present the least possible infringement on First Amendment rights of newspaper and radio broadcast owners.

1. The NBCO Rules are No Longer Needed to Achieve Media Diversity

32. The Supreme Court upheld the NBCO policy as a "reasonable administrative response to changed circumstances in the Broadcasting industry." The Court made reference to the Commission's statement in the *Order* adopting NBCO that at one time, the Commission had actually encouraged co-ownership of newspaper and broadcast facilities because of a shortage of qualified license applicants. However, by 1975, the Commission had concluded that a sufficient number of qualified and experienced applicants other than newspaper owners was now available. In addition, at that time the number of new channels open for new licensing had diminished substantially.

33. Citing to previous decisions where it had upheld the validity of an FCC regulation as against a First Amendment challenge,[34] the Court dismissed facial challenges to the NBCO Rules filed by several intervenors, including ANPA (now "Newspaper Association of America" ("NAA")) and NAB. Where a license is denied because to do so would serve the public interest, said the Court, is not a denial of free speech. Finally, the Court distinguished cases cited by the intervenors where it had previously struck down federal laws which imposed conditions on the receipt

[34] *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Storer Broadcasting*, 351 U.S. 192 (1956); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

of a federal benefit tantamount to surrendering First Amendment rights[35] by suggesting that the regulations in question in those cases directly abridged freedom of expression since a denial was based solely on content; here, the regulations were not content-related, said the Court, and their purpose and effect is to promote free speech not to restrict it.

34. From a public policy perspective, a significant basis for overturning the regulatory constraints against newspaper-broadcast cross ownership is that *changed circumstances* warrant their elimination. Since "changed circumstances" was the basis for the Supreme Court finding the NBCO Rules reasonable twenty years ago, the same rationale can be used today to justify their repeal.

35. Ten years after the adoption of the NBCO Rules, it had become clear that changed circumstances had eliminated the need for the rules, and that their continued enforcement was exacerbating the problem of declining newspaper ownership and readership as an alternative media. Between 1975 and 1987, for example, the number of dailies had declined from 1,756 to 1,645–a reduction of 111 newspapers. And, while total circulation of dailies during the same period had increased by approximately 2.2 million, it had declined as a ratio of population growth, from 28.15% to 25.93%.[36]

36. Based upon the data collected *since* 1987, it must be concluded that the trend is not slowing down, but accelerating. Between 1987 and 1997, for example, **136** more dailies ceased operation, bringing the total down from 1,645 to

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[35]*See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958); *Elrod v. Burns*, 427 U.S. 347 (1976).

[36]As shown by statistics from subsequent years set forth below, this increase in circulation was short-lived.

1,509.[37] Even more alarming is the fact that U.S. daily newspaper circulation since 1987, has actually *decreased* by over *six million,*[38] having declined *every year,* in fact, between 1987 and 1997, except for 1991.[39] When one compares this negative trend with the phenomenal growth of the electronic media (which has continued unabated since 1987), a significant case can continue to made–in fact more telling since 1987–that the NBCO Rules are not only no longer necessary but actually may be hastening the demise of the local daily newspaper.[40]

2. *Continued Enforcement of the NBCO Rules is Counterproductive.*

37. From the above statistics, it may be concluded that continued enforcement of the NBCO Policy is counterproductive to the stated goals of "diversity." The print media has taken a disturbing downturn since the adoption of the Policy. In an attempt to keep daily newspapers viable, Congress in 1970 enacted the NEWSPAPER PRESERVATION ACT.[41] The Act exempted newspaper joint operating agreements from the application of the federal antitrust laws, if, at the time of the

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[37]SOURCE: Newspaper Associate of America ("NAA"), *Facts About Newspapers, 1998 Ed.*, p. 11.

[38]In 1987, total daily (*i.e., morning and evening*) circulation was at an all-time high of 62,826,273. By 1997, total daily newspaper circulation had dwindled to 56,727,902, a loss of 6,098,371. SOURCE: NAA, *Facts About Newspapers, 1998, supra,* at 11.

[39]*Id.* According to the Audit Bureau of Circulation, an independent publication circulation verification firm, daily newspaper circulation in the first quarter of 1998 increased very slightly, by 0.072%. Sunday circulation for the same period, however, decreased by 0.172%. NAA, "Newspaper Industry Sees Gains in Circulation and Readership." Press Release, July, 1998.

[40]FOE is not suggesting that the NBCO rule is the sole cause of the decline of daily newspapers, only that is a *contributing factor* that is clearly counterproductive of the Commission's avowed goal of media "diversity."

[41]PUBLIC LAW 91-353, 15 U.S.C. §1801.

arrangement, not more than one of the newspaper publications involved in the performance of such an arrangement was likely to remain or become a financially sound publication.[42] There are presently 17 joint operating agreements in effect.[43]

38. Continued enforcement of the NBCO Policy is thus in conflict not only with the Commission's policy of diversity but the public policy expressed by Congress in the implementation of the NEWSPAPER PRESERVATION ACT as well.[44] FOE respectfully submits that continued enforcement of a policy which tends to reduce diversity and effective competition is directly and fundamentally contrary to the public interest.

39. Continued enforcement of the NBCO Policy will also continue to diminish broadcast program service. In its initial Rule Making adopting the NBCO Policy, the Commission acknowledged that stability of the industry and continuity of ownership served important public interest purposes because they encouraged commitment to program quality and service.[45] That co-located newspaper-broadcast combinations had provided "undramatic but nonetheless statistically

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[42]*See* 15 U.S.C. §§1801-1803.

[43]NAA, *Facts About Newspapers, 1998, supra*, p. 26.

[44]That Congress apparently acted inconsistently with the Act, by prohibiting in its 1987 appropriations bill the FCC from conducting Rule Making proceedings to repeal the NBCO Policy, is explained by the political motivations of the Congressional Leaders at the time. Based upon the remarks of some U.S. Senators during the debate, it was clear that the rider was retaliatory in nature against Rupert Murdoch (whose newspapers had been highly critical of Senator Kennedy and others), and an attempt to suppress free speech. *See, NewsAmerica Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988).

[45]*See, Newspaper Broadcast Cross Ownership Policy*, 50 FCC 2d 1046, 32 RR 2d 954, 1032 (1975).

significant superior" program service in a number of program particulars was too clear in the record to be denied by the Commission.[46]

40. The Commission has also recognized in other contexts that the amount of available capital has a significant relationship to the quality of program service provided. Although one might argue that the acquisition of a troubled newspaper by a radio broadcast licensee (or *vice versa*) would necessarily diminish the capital available to the broadcaster, the opposite is true. Greater economies of scale through a greater revenue base and considerations of space, consolidation, and accounting would yield additional financial resources made available for both programming and newspaper circulation without jeopardizing editorial independence. Accordingly the elimination of the Newspaper-Broadcast Cross Ownership Policy would serve to enhance broadcast service and have the added public interest benefit of providing additional economic stability to the print media.

3. *Continued Enforcement of the NBCO Rules, as Applied to Radio Broadcasting is Inconsistent with the First Amendment*

41. The ownership regulations that broadcasters must observe were put in place to maximize outlets for local expression and ensure diversification of programming. Unfortunately, the regulations no longer effectuate these policies. Eliminating the stringent ownership rules would allow radio broadcasters to compete more effectively with other media, thereby ensuring quality and diversity in programming for the public. The ownership rules not only stifle productivity, but also infringe upon broadcasters' First Amendment rights: radio broadcasters are prevented from freely selecting the media to present their programming to the

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[46] *Id.*

public, and are also denied the ability to bargain for better programming. The structural limitations placed on broadcasters thus eliminate from particular markets and the public major providers of information.

42. To be constitutional, governmental regulations which favor certain classes of speakers over others must be supported with a compelling state interest.[47] In *Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445, 2468, 75 RR 2d 609 (1994), the Court reaffirmed that "[r]egulations that discriminate among media, or among different speakers within a single medium, often present serious First Amendment concerns." Regulation which restricts the speech of some elements of society in order to enhance the relative voice of others is presumed invalid. *Buckley v. Valeo*, 424 U.S. 1 (1976). Such discrimination constitutes an indication that the rule's purpose is to regulate the message provided by certain speakers, and is highly suspect. The fact that the restrictions may operate against only a small group of speakers is irrelevant.[48] The scarcity and diversity rationales do not adequately justify such rules in light of the enormous amount of programming and information available to consumers.

43. From a First Amendment perspective, radio Broadcasting can hardly be considered unique when compared to other mass media information sources. The First Amendment would be better served by placing radio broadcasters on

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[47] *Home Box Office*, 567 F.2d at 47-48 (D.C. Cir. 1977).

[48] *C&P Telephone*, 76 RR 2d at 995.